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Architerctural Committee of the Mt Olympus Cove Subdivision No 3 v. Amy E. Kabatznick : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 970188-CA

ARCHITECTURAL COMMITTEE OF THE MT. OLYMPUS COVE SUBDIVISION NO. 3, Plaintiff and Appellant, v. Amy E. KABATZNICK, Defendant and Appellee.	Case No. 970188-CA Priority No. 15

REPLY BRIEF OF APPELLANT ARCHITECTURAL COMMITTEE OF MT. OLYMPUS COVE SUBDIVISION NO. 3

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH THE HONORABLE TYRONE E. MEDLEY PRESIDING

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REPLY BRIEF OF ARCHITECTURAL COMMITTEE OF MT. OLYMPUS COVE SUBDIVISION NO. 3

On May 18, Plaintiff-Appellant Architectural Committee of the Mt. Olympus Cove Subdivision No. 3 ("the Architectural Committee" or "the Committee") filed its Initial Brief in this proceeding. On June 24, 1997, Defendant-Appellee Amy E. Kabatznick filed her responsive brief ("Kabatznick Brief").[1] The Architectural Committee respectfully submits its Reply Brief in response to the Kabatznick Brief.

I. PRELIMINARY MATTERS

A. KABATZNICK HAS IMPROPERLY ARGUED THE MERITS OF THE CASE WITH ALLEGATIONS AND CLAIMS THAT ARE OUTSIDE THE RECORD AND WOULD BE DISPUTED AT TRIAL

Kabatznick's brief deals extensively in allegations and claims of factual matters that are not part of the record in this case. (*E.g.*, Kabatznick Brief at 5-8, 29) The Architectural Committee believes this is improper and contests these extra-record matters in two ways: (1) Kabatznick's claim that the recitations on pages 5-8 of her brief have been "admitted" by the Committee is simply wrong. Kabatznick has, in a variety of pleadings, attempted to argue factual matters that have never been submitted as evidence nor become a part

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[1]The original filing date for Kabatznick's brief was June 18, 1997. The Architectural Committee had stipulated to Kabatznick's request for a 30-day extension (to July 17), but Kabatznick's brief was still filed seven days out of time. Pursuant to Utah Rules of Appellate Procedure 26(c), the Architectural Committee is filing a motion concerning the out-of-time filing under separate cover.

of the record in the case. (2) The Committee contends that many of Kabatznick's "factual" claims and characterizations are simply false, and they would be refuted at trial. However, this Court is not the forum to argue evidentiary matters that have never been adjudicated by the trial court. Except to make a brief summary statement to contest the primary non-record fact claims of Kabatznick, the Committee will not undertake a point-by-point rebuttal of these various extra-record evidentiary matters.

Kabatznick's claim that her motion to dismiss on jurisdictional grounds is in the nature of a motion for summary judgment is a construction that, quite simply, has no basis in law or fact. Therefore, the tortured conclusion that the arguments of counsel in various pleadings before the trial court have been "admitted" is totally groundless. It cannot be disputed that no direct evidence was ever taken by the trial court; that the only affidavit-based evidence was submitted by the Committee in its July 9, 1996, filing in response to Kabatznick's motion to dismiss [R. 394-96]; that no Rule 56 motion for summary judgment was ever filed; and that the only pleading that has brought us all before this Court was a straightforward motion to dismiss based on a claim of no standing to sue. Further, it is not insignificant that Kabatznick's Statement of Facts section is primarily supported by reference to various depositions that are not part of the record on appeal.

Nothing here permits Kabatznick's peculiar conclusion that she is entitled to deem her unilateral, pleadings-based claims and statements of counsel as

"undisputed based on deposition transcripts cited," nor that "[s]uch factual matters were presented to the trial court with no objection or dispute by the parties." (Kabatznick Brief at 4-5.) The position is a patent misrepresentation of the state of the record, and various "factual" claims relied on by Kabatznick as undisputed have not seen the light of a factual adjudication.[2] To the extent Kabatznick relies on them in her Brief, the conclusions drawn from them are, at best, not justified nor reliable.

B. THE COMMITTEE'S CITATION TO UTAH RULE OF CIVIL PROCEDURE 17(a) IS PROPER ARGUMENT TO SUPPORT PERMITTING AN AMENDMENT TO THE ORIGINAL COMPLAINT

Kabatznick argues that the Committee may not cite Utah Rules of Civil Procedure 17(a) for the first time in its Initial Brief to this Court in support of its position that the trial court should not have rejected both amended complaints in the proceeding.

The general rule that parties may not raise an issue for the first time on appeal has no application here. In the first place, the argument that is at stake here is whether the Committee property owners are legally entitled to amend the original complaint with relation back to June 13, 1995. The principle that

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[2]The recitation in the numbered paragraphs on pages 5-8 and the paragraph at the bottom of page 29 of Kabatznick's Brief are not only taken largely from materials outside the record, they contain claims and conclusions with which the Committee vigorously disagrees. For example, claims in paragraph 9 on page 7 that the Committee "remained completely silent and failed utterly to notify her" are, at best, flagrant distortions of what actually took place; but, in all events, these are not factual matters that are currently before this Court.

an issue or argument may not be raised for the first time on appeal should no more preclude the Committee from citing Rule 17(a) in support of its position than it would prevent it from citing a supporting judicial decision for the first time on appeal.

The only case cited by Kabatznick, *Ong International (U.S.A.) Inc. v. 11th Avenue Corp.*, 850 P.2d 447, 455 (Utah 1993), involved a full trial on the merits, and the defendant attempted to raise on appeal the basic issue of when claims arose relative to a statute's effective date. Here, the case never got beyond a procedural dismissal of the original and amended complaints. *Ong* does not apply. The principle that prohibits raising issues for the first time on appeal does not preclude a party from citing supporting law for the first time on appeal. The citation to Rule 17(a) is merely ancillary support to the basic procedures provided under Rule 15; the citation to Rule 17(a) doesn't raise a new issue or argument.

The Committee has, by the nature of the amendment process itself, properly raised the amendment issues with the trial court: The Committee's first amended complaint was a direct response to an order of the trial court and was not, therefore, accompanied by any memorandum or argument. [R. 343-60] The second amended complaint and supporting memorandum [R. 478-96] were in response to what the Committee believed was an improper dismissal of the first amendment. The very acts of seeking to amend the original complaints properly raised this as an issue and do not preclude the citation of Rule

17(a) as support for the first time on appeal.

Equally as fundamentally, the dispositive procedural nature of the issue did not provide any reasonable opportunity to raise the Rule 17(a) argument with the trial court. Because that court simply dismissed the attempts to amend, an appeal under Utah Rules of Appellate Procedure 4 is the first opportunity for the Committee to seek redress. In raising this issue as grounds to dismiss the appeal, Kabatznick does not explain *when* the Committee and the individual property owners were supposed to raise the argument prior to filing an appeal.[3] In contrast to *Ong*, where the issue that the Court refused to hear on appeal was early in a full trial, the first action by the trial court to which the Committee could react and raise *any* argument or objection was the final, appealable order issued on November 18, 1996.

Accordingly, the citation to Rule 17(a) was properly included in the Committee's Initial Brief.

II. RESPONSE TO KABATZNICK'S MAIN ARGUMENTS

A. ABSENCE OF A STATUTE OR RULE OR SPECIFIC COVENANT PROVISION DOES NOT FORECLOSE THE ARCHITECTURAL COMMITTEE FROM BRINGING AN ACTION TO ENFORCE SUBDIVISION COVENANTS.

Kabatznick's Argument A states as follows: "Standing requires a proper

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[3]Recall that the first amended complaint was an attempt to comply with the trial court's order. It was not a procedure initiated by the Committee, and the Committee's response to the dismissal was naturally oriented around the apparent basis for the judge's actions—not why the judge should permit an amendment generated in the first instance by the Committee.

plaintiff that exists as a legal entity entitled to sue in its common name by statute or court rule and plaintiff fails these requirements . . . ."

Kabatznick's Brief cites no direct authority for this conclusion. The Committee believes that this is not the state of the law in Utah. That is, the aggregate of Utah statutes and court rules that provide directly the right to bring actions are not exclusive and do not delineate every entity or situation that may give rise to a cognizable action. That is not the nature of common-law American jurisprudence.[4]

Simple counter-examples to Kabatznick's assertion are found in situations in which third-party beneficiaries are entitled to bring actions in their own names.[5] In most states—and in Utah, in particular—statutes do not explicitly grant third-party beneficiaries the right to bring actions to enforce contracts. Yet, there is a common-law right of action under certain circumstances.[6]

Under Kabatznick's "rule," the Utah Restaurant Association would never have made it out of the starting gate to bring a successful action against the Davis County Board of Health. In *Utah Restaurant Ass'n v. Davis County Board of Health*, 709 P.2d 1159 (Utah 1985), the Utah Supreme Court concluded that, for certain types of actions, an association of businesses *could*

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[4]*See, e.g.*, 59 Am. Jur. 2d *Parties* §§ 1-2 (1987).

[5]*See, e.g.*, 17A Am. Jur. 2d *Contracts* §§ 435-439 (1991).

[6]*Id.*

bring an action to obtain relief for its constituent members. Yet, there appears to be no statute or rule that specifically grants the right to sue to such associations. Kabatznick's theory would dictate that the Utah Supreme Court simply had no ability to permit the Utah Restaurant Association to proceed as a plaintiff.

Kabatznick cites the case of *Disabled American Veterans v. Hendrixson,* 9 Utah 2d 152, 340 P.2d 416 (Utah 1959), to support her contention. But the more recent case of *Cottonwood Mall Co. v. Sine*, 767 P.2d 499 (Utah 1988), arrived at a contrary result—one that disproves Kabatznick's general theory. In *Cottonwood*, the Supreme Court concluded that then-Rule 17(d)'s[7] omission of the right to sue for joint ventures did *not* preclude the joint venture from suing in its own name. This, then, is an example of an entity that was deemed to have the right to sue, despite the absence of a specific statute or rule that granted it.

The other cases cited in Kabatznick's Argument A do not shed any particular light on this case, because they deal with situations where there *is* a statute that controls.[8] Indeed, Kabatznick concedes that the Utah courts have

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[7]Rule 17(d) has since been amended to incorporate the holding in *Cottonwood* by adding an explicit right to sue for certain business associations.

[8]In that regard, the portion of Kabatznick's Brief that discusses Rule 17(d) attacks a straw man. The Committee did not cite Rule 17(d) in its Initial Brief and has not relied on it. To the extent that Rule 17(d) contemplates certain business operations as its foundation, the Committee concedes that it may not satisfy (continued...)

not addressed the standing issue in a case where a management committee created by restricted covenants has attempted to bring an action on behalf of lot owners to enforce their right to injunctive relief. (Kabatznick Brief at 22.) Accordingly, it is appropriate for this Court to address the matter by applying the analysis of a foundational case decided by the Supreme Court in which the standing of an association of common members was considered—namely, the *Utah Restaurant* case, which is discussed in more detail in the Committee's Initial Brief (at pages 9-14) and under § II.C of this Reply Brief.

B. THE SUBDIVISION PROPERTY OWNERS' INTERESTS ARE HELD SUBJECT TO THE COVENANTS' PROVISIONS, ONE OF WHICH IS TO DELEGATE IMPLEMENTATION OF ARCHITECTURAL STANDARDS TO THE ARCHITECTURAL COMMITTEE.

Argument B of Kabatznick's Brief correctly notes that restrictive covenants comprise burdens and benefits that run with the land. It also correctly notes that individual property owners have standing to bring actions to enforce covenants that burden or benefit the underlying property. However, it is *incorrect* for Kabatznick to leap from these principles to the unwarranted conclusion that *only* individual property owners may bring an action of the type

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[8](...continued)
such a requirement. But, contrary to Kabatznick's pejorative representation that the Committee is "a purported committee of a few persons claiming to be a genuine association," an allegation for which there was no evidence on the record before the trail court nor before this Court, the Committee is exactly what the Restrictive Covenants provided for: a designated individual or individuals who "have full authority to approve or disapprove [the] design and location" of new or altered buildings under the standard of "conformity and harmony of external design with the existing structures in the development." [R. 9]

now before this Court.

Article I of the Subdivision's Restrictive Covenants provides for an architectural standard and then delegates an organization to implement the standards—the Architectural Committee. All property owners, including Kabatznick, have taken their property with the attached benefits (or burdens, from Kabatznick's point of view), including this delegation of responsibility to the Architectural Committee. This is a direct application of the running-with-the-land principle cited in Argument B of Kabatznick's Brief (at pages 17-21). That is, when Kabatznick purchased Lot 28, she not only bought the ground and the building on it, she bought the architectural constraints and the delegation to the Architectural Committee of responsibility to implement those constraints.

Kabatznick's Brief (at pages 19-20) ascribes an almost pointless, vacuous function to the Committee—merely to receive and review architectural plans for conformity to the Covenant's standards and nothing more. Under this construction, the Committee's rôle would be a near nullity. Yet, contracts and other legal documents are to be construed to be rational and reasonable if possible.[9] Kabatznick's strained, artificial construction would require individ-

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[9] *See, e.g., G.G.A., Inc. v. Leventis*, 773 P.2d 841, 845 (Utah Ct. App. 1989) (interpretation of contract to give objective and reasonable construction to the contract as a whole, and to give effect to all of its terms if possible); *First Security Bank of Utah, N.A. v. Maxwell*, 659 P.2d 1078, 1082 (Utah 1983) (as between conflicting interpretations, preference for equitable result over a harsh (continued...)

ual Committee members—and perhaps others—to undertake separate action and the accompanying individual burdens. This is not consistent with the responsibilities assigned to the Committee by the Covenants and is exactly the type of situation that the Utah Supreme Court addressed in *Utah Restaurant* in finding that justice was not well-served by requiring associated individuals to pursue a common grievance as separate parties. Denying the Committee, as decision-maker under the Covenants, the authority to take action concerning Covenant non-compliance is not a rational interpretation of Article I of the Covenants and should be rejected by the Court.

The Covenants *do* run with the land; they were intended to maintain certain standards and to provide a mechanism for implementation. Kabatznick and all other property owners are accordingly bound by the delegation of authority to the Committee that is incorporated in those Covenants.

As anticipated in the Committee's Initial Brief (at pages 12-14), Kabatznick takes the position that the absence of a provision in the Subdivision's Covenants explicitly granting the Committee the ability to file a lawsuit should dispose of the standing question. The Committee won't repeat its Initial Brief arguments, but will only add the observation that, contrary to the reading that

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[9](...continued)
and inequitable result); *Continental Bank & Trust Co. v. Stewart*, 291 P.2d 890, 893 (Utah 1955) ("rational and just" construction of contracts).

Kabatznick wants to put on it, Article XIV[10] of the Covenants does *not* read "it shall be lawful **only** for any other person or persons owning property situated in said tract to prosecute any proceedings at law or in equity." And, as pointed out in the Committee's Initial Brief (at 13, n.8), it's not even clear that such language could foreclose other parties with bona fide interests to protect by enforcing the Covenants.

C. THE ANALYTIC FRAMEWORK OF *UTAH RESTAURANT ASS'N* AND *WARTH V. SELDIN* IS APPLICABLE TO ESTABLISH THE STANDING OF THE ARCHITECTURAL COMMITTEE TO PURSUE RELIEF THAT IS COMMON TO THE SUBDIVISION OWNERS.

Kabatznick's Argument C appears to be founded on the theory that there must be a "statute or rule" that permits the Committee to bring what Kabatznick has described as "an action in representative capacity," as though the term "representative capacity" will defeat the Committee's position. First, the Committee's existence is a direct creation of the Covenant and has been given responsibilities that it seeks to carry out directly by bringing this action. It proceeds in "representative capacity" only to the extent that the Covenants so contemplated by forming such a group to obtain appropriate results for its constituency. There is nothing sinister or out-of-the-ordinary about it.

More importantly, perhaps, Kabatznick's statute-or-rule approach is not the foundation of the analysis that the *Utah Restaurant Ass'n* case undertook.

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[10]See Committee Initial Brief, at 13 n.7, for the explanation of a minor numbering discrepancy.

Rather, in that case, the Utah Supreme Court considered fundamentals of judicial efficiency and fairness to conclude that, for certain actions in which the individual members of an association played no particular individual role, but who sought a common remedy or outcome, an artificial barrier to pursuit of such a remedy should not be thrown up to require only individuals to pursue the action. In that connection, the Supreme Court did not enter into an analysis of whether there is a "statute or rule" that permitted the Utah Restaurant Association to maintain an action.

Still, Kabatznick focuses on statutes and rules as though they are the only source of the right to bring an action seeking equitable relief. The Committee does not dispute that there is no statute, court rule or Utah case precedent that provides: "Architectural committees of Utah subdivisions are authorized to sue and be sued in the courts of Utah." Nor, does the Committee contest the observation that the Restrictive Covenants of the Subdivision do not expressly recite similar words. But the negative inference that, in the absence of such provisions, the Committee has no standing is logically and legally unsupportable, as discussed in § II.B of this Reply Brief.

The Committee's Initial Brief also treats this point on pages 12-13, noting that common-law rights to bring actions may exist in addition or as complements to statutory rights to sue. Kabatznick's references to condominium cases such as *Ruffinengo v. Miller*, 579 P.2d 342 (Utah 1978), are quite irrelevant to this case. Rather, the relevant analysis is contained in the *Utah*

Restaurant case.

Kabatznick attempts to distinguish *Utah Restaurant* by noting that the Utah Restaurant Association was incorporated, while the Committee is not. Although there is such a factual difference, Justice Zimmerman's analysis and the Court's opinion do not at any point invoke this fact in concluding the association had standing. Indeed, the *Utah Restaurant* analysis, as well as that in the *Warth v. Seldin*, 422 U.S. 490, 511 (1975), case, provides a public-policy foundation that applies directly to any formalized association, whether incorporated or not. Parts of the reasoning bears repeating:

> Where, as a practical matter, the rights asserted and the remedies sought do not require direct participation by affected individuals who would have standing, there is no reason not to permit associations to press claims common to their members. This approach to standing has the advantage of permitting the prosecution of legitimate claims by an entity with the capacity to spread the costs of litigation among its members and to assume the burdens incident to it, rather than requiring a single litigant to carry the entire load.

709 P.2d at 1163. And further:

> To deny an association standing under such circumstances just might deter the assertion of valid claims without serving any countervailing purpose. We decline to take such a sterile approach to standing and adopt the [*Warth*] test above for determining an association's standing to sue.

Id.

Although it is never explicitly raised, the following implication is found in Kabatznick's Brief: Some (a minority) of the Committee do not directly possess property interests in the Subdivision; therefore, the Committee contains

"strangers" to the Subdivision, preventing it from maintaining an action. It is undisputed that three of the members are property owners; a fourth has an indirect interest as the trustee of a family trust that holds property; and the other three are resident-spouses of property owners. All are current members of the Committee, and all have an interest in the benefits conferred by the Restrictive Covenants—either as owners or perhaps as third-party beneficiaries.[11] Thus, although the Covenants do not require the Committee to comprise only Subdivision property owners or residents, all members of the Committee do have a real interest in the enforcement of the Covenants, and *Utah Restaurant* applies directly.[12]

To distract attention from the real interest that Subdivision owners and residents have in enforcing the Covenants, Kabatznick tries to convince the Court that the Restrictive Covenants are, in some way, unrelated to the current property owners: "Covenant I [dealing with the Committee and the architectural standards] was plainly for the benefit for of the developer and the protection of his resale value and not for the benefit of the individual residents." (Kabatznick Brief at 24) This is a fictional construct, entirely unsupported by anything in the record, anything outside the record, and contrary to the general recogni-

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[11]*See, e.g.*, 17A Am. Jur. 2d *Contracts* §§ 435-439 (1991), discussing situations in which persons without privity of contract may, nevertheless, bring an action on their own behalf.

[12]Kabatznick's Brief never addresses the basic policy foundation in *Utah Restaurant* to show why the conditions in that and the *Warth* cases do not apply here.

tion of the validity of real-property restrictive covenants.[13] Kabatznick's argument in this regard is totally inconsistent with her Argument B, which (not improperly) observes that the Covenants run with the land. Indeed, if they run with the land, then successive holders of property interests in the Subdivision take with the burdens and benefits of the Covenants, one of which is that there is an ongoing mechanism to protect them from the invasion of a new property owner who might erect a radical structure that is not in "conformity and harmony of external design with existing structures in the development." The allegation that this covenant is solely for the benefit of the original developer and does not serve as a benefit that attached to the current property owners themselves incorrectly states the legal effect of Article I of the Covenants.

D. RULE 17(a), SUPPORTING CASE LAW, GENERAL PRINCIPLES FAVORING THE ADJUDICATION OF CASES ON THE MERITS, AND THE FACTS IN THIS CASE REQUIRE LEAVE TO AMEND THE ORIGINAL COMPLAINT IF THE ARCHITECTURAL COMMITTEE IS FOUND NOT TO BE THE PROPER PARTY.

Argument D of Kabatznick's Brief appears to argue that Rules 15(a) and 15(c) do not apply to this case because "there is no identity of interest between the Committee and the lot owners." (Kabatznick Brief at 32.) This claim misconstrues the phrase "identity of interest" by equating it to "identity of parties." The analysis is not on the *parties*, but on the *interests* of the parties and

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[13]*See, e.g., Freeman v. Gee*, 18 Utah 2d 339, 423 P.2d 155, 162 (Utah 1967). Kabatznick cites this case for the irrelevant point that, *if* the Architectural Committee ceased to function, individuals would still have a right of action to enforce the covenants—a point the Committee does not dispute.

how the case would unfold were the case to go forward with the amended parties. In *Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214, 216 (Utah 1984), a case cited by Kabatznick, an amendment failed because the *interest* of a new party (the manufacturer of an allegedly defective door) was not the same as the interest of the original defendant (the supplier of the door). It is fairly clear that a case with such separate entities in the chain from the manufacturer to the ultimate consumer differs fundamentally from the factual circumstances before the Court, in which the individuals are a subset of the originally named plaintiff—an organization created and delegated to protect certain property interests for those individuals.

Kabatznick cites *Doxey-Layton Co. v. Clark*, 548 P.2d 902, 906 (Utah 1976), for the proposition that Rule 15(c) does not generally apply to the addition or substitution of new parties. But her Brief does not go on to cite the applicable part of the case: "The exception [to this rule] operates where there is a relation back, as to both plaintiff and defendant, when new and old parties have an identify of interest; so it can be assumed or proved that relation back is not prejudicial." *Id.* at 906.

If there were ever a case of identity of interest for purposes of Rule 15(a), this must be it. Absolutely no aspect of the case changed when the formal amendments were submitted: facts, circumstances, relevant witnesses, remedy, discovery—they would all have been the same. The upshot is that the Committee and the individual property owners do have the requisite identity of

interest contemplated by Rule 15 and the interpretative case law.

The basic application of Rule 15(a) should focus on the language itself: "[*L*]*eave shall freely be given* [*to amend*] *when justice so requires*." (Emphasis added.) The Committee and the individuals who have (conditionally) sought to be joined or substituted believe that the current case presents exactly the type of situation contemplated by this language.[14]

"Justice" in this case should recognize that the Subdivision's Restrictive Covenants provided an explicit architectural standard to be administered by the Architectural Committee and that the Committee has proceeded in a straightforward fashion under that delegation. It has attempted to carry out its duties to implement the requirement of those Covenants in the face of an owner who (1) has conceded that she did not seek Committee approval pursuant to the Covenants until she was some way along with her reconstruction, (2) did not submit the plans for the structure until the Committee had reminded her of her obligations under the Covenants, (3) ignored the Committee's finding that the plans did not comply with the Covenants, and (4) is proceeding with construction.

These facts and the law surrounding the substantive dispute were fully

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[14]*See generally* 3 Moore's Federal Practice §§ 15.15, 15.16[1], 15.19[2], 15.19[3] (3d ed. 1997) for a variety of situations in which the basic approach to Rule 15 is to grant the right to amend when the facts and circumstances are not materially different from the original pleading and there is no prejudice to the parties.

developed through discovery and pre-trial preparation, and trial was only days away before the current procedural issue was raised and proceeded to the current stage of the case.

To the extent that the Committee is deemed unable to proceed without joinder or substitution of one or more Subdivision property owners, it would be a palpable injustice to deny the plaintiffs the ability to amend under Rules 15(a) and 17(a) and to attach the relation-back provision of Rule 15(c) to it. As the Committee and individuals have previously stated [R. 343; 382, ¶ 12], the amended complaint (in either form) involves the identical set of facts and circumstances relative to the original pleading; it raises no new issues; it pleads no different or additional facts;[15] it seeks no different remedy; and—perhaps most conclusively—it causes *no* prejudice to the defendant in responding to the issues raised and remedies sought on June 13, 1995.

Kabatznick has been on notice of the full definition of the dispute, the relevant facts and circumstances, and the remedy sought by the Committee since "day one." The factual presentations at trial, the legal arguments and the relevant considerations to allow a tribunal to reach a decision on the merits would not have changed one whit by the joinder or substitution of individual lot owners. Reason: The actions complained of and the relief sought goes only to the Kabatznick structure and does not involve in any individual way the

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[15]Except as necessary to identify the individual property owners.

property owners in the Subdivision.[16]

Under the theme of Rule 15, justice requires that aggrieved homeowners of the Subdivision be heard, that the merits of their case be put before the trial court, and that the case go forward as of the time of the filing of the original complaint. Although it did not center around Rule 15, the basic analysis of *Utah Restaurant* is applicable here as well: "Where, as a practical matter, the rights asserted and the remedies sought do not require direct participation by affected individuals who would have standing, there is no reason not to permit associations to press claims common to their members." *Utah Restaurant*, 709 P.2d at 1103. Read in connection with Rule 15, the only fair conclusion to reach is that any formal amendment necessary to the case should proceed under the relation-back provision of Rule 15(c).

Finally, in the context of Rule 17(a), Kabatznick raises the case of *Estate of Haro v. Haro*, 887 P.2d 878 (Utah App. 1994),[17] to defeat any amendment by joinder of substitution. In *Haro*, there was a fundamental error in the original complaint's specification of a plaintiff whom the Legislature had, in effect, found to be an inappropriate potential beneficiary in a wrongful-death action. Citing the observation that "the purpose of the statute is 'to

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[16]Another way to see this is to ask whether the development of the lawsuit and its ultimate resolution would change in any material way if some other set of individual property owners who were to be joined/substituted. The answer is clearly "no."

[17]Kabatznick's Brief cites to **880** P.2d.

provide compensation to those who were dependent on the decedent'," a panel of this Court found that the Legislature had specifically limited the possible benefits of a wrongful-death action to the heirs of the decedent, and that the decedent's estate was not entitled to any such benefits.

In the case now before the Court, the individual property owners and the Committee of which they are members are directly and inherently connected with the same interests in the case. This identity of interest, which was discussed above, satisfies all of the elements of notice pleading: the defendant has been on notice from the very beginning what the elements of the dispute were all about and who was on the other side of the contest. Should the Committee not have the requisite standing, a technical misdesignation of the Committee made up of individuals, most (if not all) of whom may bring the same action should not produce the inequitably harsh result of forcing the suit to begin anew. These considerations contrast with the distinctly separate interests of the estate of Haro vis-à-vis the heirs of Haro—fundamentally different entities in the eyes of the wrongful-death statute.

III. CONCLUSION

Notwithstanding the multiplicity of cases and theories put forward in the Kabatznick Brief, this case can best be viewed with the question of "what's the fair, equitable and just result?" In consideration only of the undisputed elements of this case, Kabatznick: purchased property in the Subdivision; methodically demolished nearly all of the existing structure on the lot; began

construction of an entirely new building without complying with the Restrictive Covenants that require approval of the plans by the Architectural Committee; and ignored the Committee's disapproval of her plans when she submitted them.

Without pleading the case on factual elements that *might* be at issue before the trial court,[18] the Committee believes that the law—in particular, the analyses and policy considerations in *Utah Restaurant* and *Warth*—and the underlying equities require this dispute to be disposed of on the merits, as the facts and circumstances existed on June 13, 1995, the date the original complaint was filed.

WHEREFORE, the Architectural Committee of the Mount Olympus Cove Subdivision No. 3 respectfully requests that this Court enter its order finding the Architectural Committee had, and has, standing to bring this lawsuit against Appellee Kabatznick and remanding the case to the Third District Court with instructions to reinstate the action originally filed on June 13, 1995.

In the alternative, if the Architectural Committee did not have standing to bring suit, the Architectural Committee and its three member-property

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[18]Such as the sequence of events leading to the current composition of the Committee; whether the Committee had a responsibility to contact Kabatznick earlier in her project about the necessity for complying with the covenants; or whether the Committee's rejection of the plans when they were submitted was within the bounds of its discretion. These all contain possible factual elements that Kabatznick could properly raise at trial, but which play no role in the legal issues currently before this Court.

owners, Robert B. Wray, James. B. Streisand and Joyce K. Ridd, seek an order of this Court (a) finding that the trial court unlawfully dismissed (or denied a motion to file) amended complaints seeking to join three Subdivision property owners of record, (b) remanding the case to the trial court with instructions to proceed pursuant to one of the two amended complaints, and (c) declaring that any such amended complaint relates back to the original June 13, 1995, complaint under Utah Rules of Civil Procedure 15(a).

Dated this 23d day of July 1997.

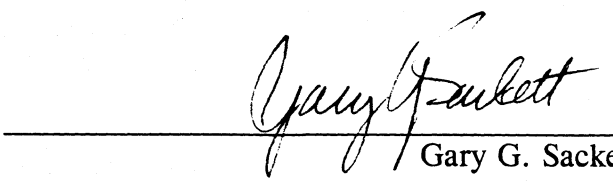
Gary G. Sackett

JONES, WALDO, HOLBROOK & MCDONOUGH
Glen D. Watkins
Andrew H. Stone
Attorneys for Architectural Committee

CERTIFICATE OF SERVICE

I certify that on the 23d day of July 1997, I caused to be delivered by U.S. Mail a true and correct copy of the foregoing Reply Brief of Appellant Architectural Committee to:

L. Benson Mabey
Murphy, Tolboe & Mabey
124 South 600 East - Suite 100
Salt Lake City, Utah 84102
Attorney for Amy E. Kabatznick



Gary G. Sackett